Nos. 93-1456 and 93-1828

IN THE

Supreme Court of the United States

October Term, 1994

U.S. TERM LIMITS, INC., *et al.*,
Petitioners,
v.
RAY THORNTON, *et al.*,
Respondents.

STATE OF ARKANSAS *ex rel.* WINSTON BRYANT,
Attorney General of the State of Arkansas,
Petitioner,
v.
BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF THE WASHINGTON LEGAL FOUNDATION; UNITED STATES SENATOR KAY BAILEY HUTCHISON; UNITED STATES REPRESENTATIVES ROBERT K. DORNAN, DANA ROHRABACHER, TILLIE FOWLER, GERALD B.H. SOLOMON, PETER I. BLUTE, BOB FRANKS, MARTIN R. HOKE, BILL BAKER, SCOTT McINNIS, DAN MILLER, BILL McCOLLUM, BOB INGLIS, JIM RAMSTAD, SCOTT KLUG, JAY KIM, AND NICK SMITH; NEW YORKERS FOR TERM LIMITS; AND THE ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

INTEREST OF THE *AMICI CURIAE*[*]

Amici curiae file this brief in support of petitioners in No. 93-1828 and No. 93-1456. Both of these cases review

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[*] Consent to the filing of this brief from counsel for the parties has been filed with the Clerk of this Court.

the same judgment of the Supreme Court of Arkansas: *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W.2d 349 (1994). *Amici curiae* consist of the Washington Legal Foundation ("WLF"); United States Senator Kay Bailey Hutchison; United States Representatives Robert K. Dornan, Dana Rohrabacher, Tillie K. Fowler, Gerald B.H. Solomon, Peter I. Blute, Bob Franks, Martin R. Hoke, Bill Baker, Scott McInnis, Dan Miller, Bill McCollum, Bob Inglis, Jim Ramstad, Scott Klug, Jay Kim, and Nick Smith; New Yorkers for Term Limits; and the Allied Educational Foundation. All *amici* have an interest in the outcome of the case *sub judice* in that it involves what have been called "term limits" on federal legislative offices.

WLF is a national nonprofit public interest law and policy center based in Washington, D.C., with over 100,000 members and supporters nationwide, including many voters residing in the State of Arkansas. WLF devotes substantial resources to litigating cases that raise issues of federalism and that affect the rights of voters and taxpayers. Along with some of the congressional *amici*, WLF has filed *amicus* briefs in support of term limits in *Legislature of California v. Eu*, 816 P.2d 1309 (Cal. 1991), *cert. denied*, 112 S. Ct. 1292 (1992), in *Lowe v. Kansas City Board of Election Commissioners*, 752 F. Supp. 897 (W.D. Mo. 1990), and in support of the petition for certiorari in *Arkansas ex rel. Bryant v. Hill*, No. 93-1828, one of the consolidated cases now before this Court.

United States Senator Kay Bailey Hutchison and United States Representatives Robert K. Dornan, *et al.*, are supporters of term limits in general and of Amendment 73 to the Arkansas Constitution in particular. They believe that term limits are constitutional, and, as Members of Congress, they have a particular interest in

whether term limits become effective. New Yorkers for Term Limits is a nonprofit organization dedicated to enacting term limits at the local level. The Allied Educational Foundation is a non-profit educational organization founded in 1964 and based in Englewood, New Jersey. It devotes substantial resources to promoting liberty and political freedom, and it has appeared with WLF as *amicus curiae* in numerous cases, including term limits cases.

In addition, *amici curiae* have a collective interest in this case that arises from their participation in *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994), which is now on appeal to the United States Court of Appeals for the Ninth Circuit as *Thorsted v. Munro*, No. 94-35222, *etc.* Like the case *sub judice*, the *Thorsted* litigation raises the issue whether a State can, consistent with the United States Constitution, restrict the ability of multi-term incumbents to have their names placed on the ballot for re-election to the United States Senate or the United States House of Representatives. WLF, *et al.*, filed briefs *amici curiae* with both the district court and the court of appeals in that litigation, arguing that the State of Washington's attempt to restrict access to the ballot for federal legislative office comported with the system of dual sovereignty between the States and the federal government established by Article I of the Constitution and confirmed by the Tenth Amendment.

The Washington Legal Foundation, *et al.*, are filing this brief *amici curiae* to encourage the Court to reverse the decision of the Arkansas Supreme Court because (among other things) the judgment below does violence to that system of dual sovereignty.

SUMMARY OF ARGUMENT

Arkansas Amendment No. 73 is a permissible exercise of State authority to regulate the time, place and manner of election of federal Representatives and Senators. Because Amendment No. 73 does not preclude the re-election of long-term incumbents to additional terms in Congress, it does not constitute an additional qualification for election to Congress. The citizens of Arkansas, through their initiative procedure, properly exercised their inherent power to regulate the election of representatives from their State to the federal legislature consistent with the Tenth Amendment.

ARGUMENT

This case presents important questions of popular sovereignty and the power of the States to give effect to unequivocal expressions of popular will. Beginning in 1990, the people of fifteen States either have established ballot access restrictions for multi-term incumbents of federal legislative office or have more directly limited the number of terms that an individual may serve as a United States Representative or Senator. Indeed, such provisions have been adopted overwhelmingly in every State in which the they have appeared as a ballot initiative. The provisions adopted to date will apply to 153 Representatives (over 35% of the total) and to 28 Senators. *See generally* Br. of State Petitioner at 24-25 & n.34. It is fair to say that "[t]he term limits movement, embracing both printed ballot restrictions and term limitations, is the most significant grassroots political phenomenon of recent years," Pet. No. 93-1456 at 8, and that the case *sub judice* accordingly "involves some of the most important election law issues ever to come before this Court." Pet. No. 93-1828 at 13.

The ballot access restrictions at issue in this case, section 3 of Amendment 73 to the Arkansas Constitution, provide that after a person has been elected to three or more terms (six years) as a member of the United States House of Representatives, or to two or more terms (twelve years) as a member of the United States Senate, he or she "shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to [those respective offices]." Pet. App. 69a.[1] As interpreted by the Supreme Court of Arkansas, Amendment 73 allows incumbents to run as write-in candidates and to serve if elected by the voters. *Id.* at 15a. The people of Arkansas adopted Amendment 73 pursuant to the initiative petition procedures in the Arkansas Constitution; Amendment 73 was approved by a vote of 494,326 to 330,836 during the November 3, 1992 general election.

Amici endorse the arguments of petitioners in these cases. *Amici* submit this brief to offer the following additional reasons why the Court should reverse the decision below. That decision rejected the argument that Arkansas Amendment 73 is "a regulatory measure falling within the State's ambit under [Article I, Section 4, Clause 1 of the Constitution]," Pet. App. 14a, and concluded that the power to impose ballot access restrictions on multi-term federal legislative incumbents "is not a power left to the states under the Tenth Amendment." *id.* at 15a. These holdings are contrary to the Court's decisions concerning the balance of power between the States and the federal government.

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[1] "Pet. App." refers to the petition appendix in No. 93-1456.

I. AMENDMENT 73 IS AN EXERCISE OF THE EXPRESS POWER GRANTED TO THE STATES BY THE CONSTITUTION TO PRESCRIBE THE TIMES, PLACES, AND MANNER OF HOLDING ELECTIONS FOR SENATORS AND REPRESENTATIVES.

The decision below failed to apply properly the principle that "the Constitution grants to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives.'" *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (quoting U.S. Const. art. I, § 4, cl. 1). This Court has repeatedly "recognized the breadth of those powers: 'It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections . . . .'" *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

That the States have primary responsibility for the regulation of federal legislative elections has been recognized since the Founding. Defending Article I, Section 4 of the proposed Constitution against criticism that it would give too much power to Congress, Alexander Hamilton emphasized the primacy of the States in the "ordinary" cases: the Convention of 1787 "submitted the regulation of elections for the Federal Government in the first instance to the local administrations." *The Federalist No. 59*, at 399 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Furthermore, the debate in the State ratifying conventions about Article I, Section 4 was framed by the understanding that whatever entity had power to regulate the time, place, and manner of federal legislative elections had very broad power indeed. *See* Stephen J. Safranek, *Term Limitations: Do the Winds of Change Blow*

Unconstitutional?, 26 Creighton L. Rev. 321, 329-40 (1993). In summarizing the result of nearly two centuries of practice pursuant to the Constitution's mode of disposing power over congressional elections, this Court cited Article I, Section 4 and observed approvingly that "the States have evolved comprehensive . . . election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Under *Storer* and other decisions of this Court, the ballot access restrictions imposed by Amendment 73 are a proper exercise of Arkansas' power to prescribe the times, places, and manner of holding federal legislative elections. The petitioners have developed this argument sufficiently, *see* Br. of State Petitioner at 9-36, and *amici* will not labor the point. There is, however, an additional and related argument that, except for a brief reference, *see* Pet. No. 93-1456 at 15, was not addressed by the petitioners in their petitions for certiorari. That argument sounds in the Constitution's general reservation of powers to the States in the Tenth Amendment.

II. THE TENTH AMENDMENT CONFIRMS THE SPECIAL REGARD OF ARTICLE I, SECTION 4 FOR STATE REGULATION OF ELECTIONS FOR SENATORS AND REPRESENTATIVES.

The Tenth Amendment explicitly enshrines the fundamental principle that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. This Court has recently reaffirmed this point, stating that "our

Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). Given its recognition of "the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government," *Gregory*, 111 S. Ct. at 2399, the Court must often take up "the task of ascertaining the constitutional line between federal and state power" drawn by the Tenth Amendment. *New York v. United States*, 112 S. Ct. 2408, 2417 (1992). This task is difficult and therefore tends to doctrinal confusion. *See, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (5-4 decision) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976) (5-4 decision)). Nevertheless, the task must be faithfully performed to give effect to the bedrock principle of "dual sovereignty" inherent in our Constitution.

A. The Tenth Amendment Permits The States To Add Qualifications For Members Of The House And The Senate Because The Constitution Does Not Prohibit The States From Exercising That Power.

The interpretive principle embodied in the Tenth Amendment is that powers not specifically delegated to the federal government nor prohibited to the States may be exercised by the States. Respondents contend that the inclusion in the Constitution of provisions setting forth qualifications for members of the House and the Senate, U.S. Const. art. I, § 2, cl. 2 & art. I, § 3, cl. 3, prohibited both the national legislature and the States from imposing any other qualifications. Respondents' argument rests on statements made by James Madison in the debates at the Convention and in *The Federalist*. At the Constitutional

Convention Madison advanced the view that the qualifications of the representatives to the national legislature should be fixed by the Constitution and be unalterable by the national legislature.[2] *Notes on the Debates in the Federal Convention of 1787 by James Madison* 427 (Ohio Univ. Press 3d rev. ed. 1987)(hereinafter "*Notes*") (opposing a draft Article VI, § 2, which would give the national legislature a power to add a property qualification).[3] Although Madison's statements certainly reveal a great deal about Madison's own thinking on this issue, they do not reflect the views of all of the Framers expressed during the Convention.

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[2] *The Federalist* No. 53 (James Madison) and *The Federalist* No. 57 (James Madison), consistent with Madison's position during the August 10 debate, indicate that the Constitution alone determines the qualifications. In *The Federalist* No. 60, Alexander Hamilton restated the position, relying on the discussion of this point in Madison's earlier articles.

[3] At the August 10, 1789 debate the Framers discussed proposed Article VI, § 2 of the August 6, 1789 draft by the Committee of Detail. *Notes* at 387. The August 10 debate focused on proposed Article VI, § 2, which would give Congress the power to add a property qualification if it so chose. This debate began with Pickney's motion (joined by Rutledge) to require a property qualification, instead of leaving the question of whether to have a property qualification to the discretion of Congress as provided in proposed Article VI, § 2. The Pickney-Rutledge proposal was defeated. *Notes* at 425-27. Madison then made his statement objecting to idea of allowing the national legislature to alter the qualifications. *Id.* at 427. Gouverneur Morris moved to change the proposed section so that the national legislature would have power to add any type of qualification. *Id.* at 427-28. Morris's proposal was also defeated. *Id.* at 428. James Wilson then recommended deleting the original proposed Article VI, § 2. The Convention deleted the section.

Shortly after Madison's remarks, Judge James Wilson opposed the same draft section that Madison opposed. Yet Wilson clearly premised his opposition to the proposed section on his view that there would exist a power to add qualifications. Madison's *Notes* report Wilson's position as follows:

> [I]t would be best on the whole to let [proposed Article VI, § 2] go out. A uniform rule [of property qualification] would probably be never fixed by the [national] Legislature, and this particular power [in proposed Article VI, § 2] *would constructively exclude every other power of regulating qualifications.*

Notes at 428 (emphasis added). Immediately after Wilson's speech, the Convention voted to delete proposed Article VI, § 2. Under Judge Wilson's interpretative view, keeping Article VI, § 2 would suggest that the only addition that could be made to the qualifications would be a property qualification adopted by Congress. Wilson had participated in the previous two days of debate, and certainly knew of proposed Article IV, § 2 (qualifications for House Members) and proposed Article V, § 3 (qualifications for Senators). *See Notes* at 386-87 (August 6 draft by the Committee of Detail).[4] Had Wilson understood those clauses to preclude any addition of qualifications, Wilson's remarks on August 10 would have made no sense. Wilson's apparent reading of those

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[4] The August 6 Draft also contained the precursor "time, place and manner" clause as proposed Art. VI, § 1. *Notes* at 387. The proposed "time, place and manner" clause, which confirmed the State power to regulate elections to the national legislature, appeared in the August 6 Draft immediately before the proposed "property qualifications" power. *Id.*

provisions—as well as his views as to whether it is desirable that additional qualifications could be imposed—were thus diametrically opposed to those of Madison, and Madison's interpretation may not be taken as the controlling view of the Convention on the issue of whether qualifications could be added.

While Judge Wilson did not clearly indicate during the debate who would exercise the power to add qualifications, Wilson's reference to "every other power" suggests that more than one body could exercise the power to add qualifications. This reading of Wilson's statement is consistent with his subsequent statements embracing the interpretative principle later enshrined in the Tenth Amendment:

> When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve; and therefore upon every question reflecting the jurisdiction of the house of assembly, if the frame of [State] government is silent, the jurisdiction is efficient and complete. But in delegating federal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of the union. Hence it is evident, that in the former case every thing which is not reserved is given, but in the latter the reverse of the proposition prevails, and every thing which is not given, is reserved.

James Wilson, Speech of October 6, 1787 *reprinted in* 1 *The Debates on the Constitution* 63, 63-64 (Bernard Baylin ed. 1993). Based on his statement of interpretative

principles, it is reasonable to assume that Wilson expected the States to have the power to add qualifications.

Early in our constitutional era, Thomas Jefferson relied on the Tenth Amendment in advancing his interpretation that the each State could impose additional qualifications on its own representatives to the national government.[5] Letter from Thomas Jefferson to Joseph C. Cabell (Jan. 31, 1814) in 11 *The Works of Thomas Jefferson* 379-81 (Paul Leicester Ford ed. Fed. Ed. 1904), *reprinted in* 2 Philip B. Kurland & Ralph Lerner *The Founders' Constitution* 81 (1987).

> Had the constitution been silent, nobody can doubt but that the right to prescribe all the qualifications and disqualifications of those they would send to represent them, would have belonged to the State. So also the constitution might have prescribed the whole and excluded all the others. It seems to have preferred the middle way. It exercised its power in part, by declaring some disqualifications . . . . But it does not declare, itself, that the member shall not be a lunatic, a pauper, a convict of treason, of murder, of felony, or of infamous crime, or a non-resident of his district; nor does it prohibit to the State the power of declaring these, or any other disqualifications which [the State's] particular circumstances may call for; and these may be different in different States. Of course, then, by the tenth amendment, the power is reserved to the State.

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[5] Jefferson apparently reached his conclusion without knowledge of Wilson's statement during the August 10 debate; the *Notes* were first published in 1840.

Id. Jefferson's reading of the Constitution thus gives strongest emphasis to the distinction in the Constitution between the delegated federal power and the broader State power. The basic interpretive presumption should be that States have power to regulate unless the Constitution clearly mandates otherwise.

Writing some twenty years later, Justice Joseph Story stated the opposing position.[6] 2 Joseph Story *Commentaries on the Constitution* §§ 623-628 (1833) *reprinted in* 2 Philip B. Kurland & Ralph Lerner *The Founders' Constitution* 84-85 (1987). The thrust of his argument is a reversal of Jefferson's and Wilson's fundamental premise of construction. For Justice Story, the establishment of certain qualifications for national legislators by the Constitution, without more, necessarily excludes any exercise of power by the States.

Justice Story's argument opens with the easy assumption that, because the House and Senate were created under the Constitution, there could be no power "reserved" to the States under the Tenth Amendment to affect the qualifications for membership in those bodies. *Id.* § 625. This assumption ignores the existence of a national government prior to the Constitution, and the States' broad power under the Articles of Confederation to control the selection of national legislators.[7]

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[6] Justice Story's argument parallels Madison's statements in *The Federalist* Nos. 53 and 57 (which were publicly available when Justice Story wrote his *Commentaries* in 1833) and Madison's argument at the August 10 debate (which did not appear in print until 1840).

[7] The Articles of Confederation provided that "delegates shall be annually appointed in such manner as the legislature of each state shall direct . . . ." Art. V, cl. 1. The use of the same broad term "manner"

Justice Story further relies on the notion that the Representatives and Senators, like the President, hold uniquely national offices and cannot be controlled by the States.[8] *Id.* § 626. Again, the argument ignores an essential distinction: the nation as a whole elects the President, but Senators and Representatives represent each State and the people thereof. To allow one State to impose additional qualifications on a Presidential candidate would be to infringe on the rights of other States. No such infringement occurs, however, when a State adopts electoral regulations that affect only its own Representatives and Senators. Such laws do not interfere with a national interest.[9]

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by the Framers of the Constitution, U.S. Const. art. I, § 4, cl. 1, suggests that they intended the States to have significant power in this area.

To be sure, the Articles also contained a national term limit in clause two of Article V. "[N]o person shall be capable of being a delegate for more than three years in any term of six years . . . ." By its terms, however, this provision did not preclude the States from adopting more restrictive limits if they so chose.

[8] The argument also fails to take into account that for a time after the adoption of the Constitution there was no national law of U.S. citizenship. Thus a candidate's ability to stand for national legislative office depended on his status as a citizen of the particular State as regulated by that State's law. *See* Madison's Report of the House Debate on May 22, 1789, in 12 *The Papers of James Madison* 179-82 (William T. Hutchinson, *et al.* eds. 1979) *reprinted in* 2 Philip B. Kurland & Ralph Lerner *The Founders' Constitution* 84-85 (1987) (examining eligibility to sit as a member of the House of Representatives as dependent on the State law of citizenship, if the State had such a law).

[9] Justice Story's requirement of uniformity in elections for national legislative office also ignores the Framers' express choice to permit the States to adopt widely varying practices in defining the electorate for

In addition, Justice Story distinguished between the powers reserved to State legislatures and the power reserved to the people of the States. *Id.* § 627. He could find no explicit delegation of this power over national legislators in any State constitution, so he concluded that any such power existed only in the people of each State but not their legislature. *Id.* To the extent that this argument is valid, it *supports* the constitutionality of Amendment 73 in this case. That provision was not adopted by an act of the Arkansas legislature, rather it was adopted by popular referendum in a direct vote of the people. Amendment 73 thus may be viewed, in Justice Story's terms, as an exercise by the people of the State of Arkansas of the power reserved to them under the Tenth Amendment.

Finally, Justice Story maintains that the national constitution was an act of the whole people, and that power over "functionaries" of the national government—including the power to set qualifications for office—could not be granted to any single state. *Id.* From this construction, Justice Story develops an evidentiary principle of federalism: The States have the burden of proving that they posses a reserved power over federal functionaries, and the States cannot meet their burden merely by relying on the failure of the Constitution to expressly deny them such power. *Id.* Again, Justice Story's analysis fails to recognize the particular nature of the national legislators as representatives of the States. None of these legislators are elected nationwide; indeed,

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selecting members of the House of Representatives. Article I, section 2, clause 1 provides that a State's decision concerning who may vote for its most numerous branch of the State legislature determines who may vote for candidates for the House.

the Constitution promotes State representation at the expense of equality of votes by the people as a whole nation by requiring two Senators, U.S. Const. art. I, § 3, cl. 1, and at least one Representative for each State, U.S. Const. art. I, § 2, cl. 3. Because of the hybrid nature of national legislators, their role as participants in the national government does not exclude some significant measure of State control over them.

Echoes of Justice Story's and Madison's analysis are discernable in the reasoning of the Arkansas Supreme Court in this case.

> Qualifications set out in the U.S. Constitution, unalterable except by amendment to that document, is a conclusion that makes eminently good sense. There is one watchword for representation of the various states in Congress, it is uniformity. Federal legislators speak to national issues that affect the citizens of every state. Additional age restrictions, residency requirements, or sundry experience criteria established by the states would cause variances in this uniformity and lead to an imbalance among the states with respect to who can sit in Congress. This is precisely what we believe the drafters of the U.S. Constitution intended to avoid.

Pet. App. 14a. This concern for a national "tidiness" with respect to qualifications for Congress is fundamentally at odds both with the nature of Senators and Members of the House as representatives of the distinct political communities formed by the States and the values inherent in the Tenth Amendment. The question cannot be resolved by solely relying on Madison's remarks during the debates, later repeated in *The Federalist*. On this issue, those sources do not adequately reflect the sense of the

entire Convention. Judge Wilson's argument during the August 10 debate recognized that there would be "other power of regulating qualifications." *Notes* at 428. Relying solely on the final text of the Constitution itself and the Tenth Amendment, Jefferson independently reached the conclusion that the Constitution "does [not] prohibit to the State the power of declaring . . . disqualifications which [the State's] particular circumstances may call for; and these may be different for different States. Of course, then, by the tenth amendment, the power is reserved to the State." Letter from Thomas Jefferson to Joseph C. Cabell (Jan. 31, 1814) in 11 *The Works of Thomas Jefferson* 379-81 (Paul Leicester Ford ed. Fed. Ed. 1904), *reprinted in* 2 Philip B. Kurland & Ralph Lerner *The Founders' Constitution* 81 (1987).

B. The Tenth Amendment And The Express Power Of The States To Regulate The "Manner" Of Holding Elections Support The Constitutionality Of Amendment 73.

The task of discerning the precise boundary between federal and State power is, happily, much less onerous where, as here, the State has not attempted to impose additional "qualifications" on candidates for national legislative office, but rather has merely imposed ballot access restrictions. As discussed previously, the Constitution itself commits specific power to the States to act in this area. The "constitutional line between federal and State power" in the election arena is drawn by Article I, Section 4, Clause 1: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the place of chusing Senators."

Thus, States are explicitly granted authority to regulate federal elections *in the first instance*. *Cf. Roudebush v. Hartke*, 405 U.S. at 24 ("*Unless Congress acts*, Art. I, § 4, empowers the States to regulate the conduct of senatorial [and congressional] elections.") (emphasis added). Consistent with the Tenth Amendment, therefore, the courts should accord great respect to a State's exercise of its authority under Article I, Section 4 because the power to regulate elections in the first instance has not been delegated to Congress. Unless Congress acts to "alter" a State's regulation of federal legislative elections, the courts should not strike down such regulation.

In contrast to *Garcia* and other decisions in which the Court has declined to apply the Tenth Amendment to invalidate an act of Congress as applied to the States, the present case involves no exercise of congressional power. Although it has indeed regulated other aspects of elections for its members, *see, e.g.*, 2 U.S.C. § 2c (1988) (providing, contrary to nineteenth-century practice, that Representatives shall be elected only from single-member districts and not at large), Congress has chosen not to regulate the facet of the electoral process at issue in this case. In the absence of any congressional action prohibiting or preempting the approach adopted by the people of the State of Arkansas in Amendment 73, the power to act in this arena is "reserved to the States, respectively, or to the people." *Cf. Gregory*, 111 S. Ct. at 2402 (The Tenth Amendment recognizes "the authority of the people of the States to determine the qualifications of their most important government officials."). In this case, the people of Arkansas, acting in accordance with their State's procedure for popular initiative and referendum, have exercised one of their reserved powers to prescribe rules for federal legislative elections.

Finally, this analysis accords with the Court's most recent teachings about the Tenth Amendment and the limits of congressional power under the Commerce Clause: States must look not to the judiciary for any "substantive restraint on the exercise of Commerce Clause powers," but instead they must rely on "the built-in restraints that our system provides through state participation in federal government action. The political process ensures that [national] laws that unduly burden the States will not be promulgated." *Garcia*, 469 U.S. at 554, 556; *see also South Carolina v. Baker*, 485 U.S. 505, 512–13 (1988). In the very same manner, the "political process," not the State or federal courts, should provide any necessary restraint on exercises of States' authority pursuant to Article I, Section 4 that are alleged unduly to burden national interests.

The Court applied essentially this principle in *Roudebush v. Hartke*, when it concluded that Indiana's recount procedures could be applied in a senatorial election. The Court acknowledged that "a State's verification of the accuracy of election results pursuant to its Art. I, § 4, powers is not totally separable from the Senate's power to judge elections and returns" pursuant to Article I, Section 5, Clause 1. 405 U.S. at 25. The lower court had found these powers inseparable, holding that a recount "would be an usurpation of a power that only the Senate could exercise." *Id.* at 24. This Court, however, found judicial intervention unjustified, because the Senate had the "ability to make an independent final judgment," that is, "[t]he Senate [was] free to accept or reject the apparent winner in [the initial count or the recount], and, if it chooses, to conduct its own recount." *Id.* at 25-26 (footnotes omitted). Accordingly, any perceived burden on national interests was best left to the political process.

Congress will surely act with respect to Amendment 73 and similar initiatives if it perceives that they unduly burden national interests in the election of Senators and Representatives. For the moment, Congress has remained content to permit the genius of our system of federalism to work undisturbed by permitting the States to act as the laboratories of democracy. So long as Amendment 73 does not infringe on the individual rights of any candidate or voter under the First and Fourteenth Amendments—and the petitioners and other parties ably demonstrate that it does not, *see* Br. of State Petitioner at 33-34 n.38; Br. of Respondents Jay Dickey, *et al.* in Support of Petitioners at pt. II—this Court should leave questions concerning the limits of State authority to the political process. Because the decision of the Arkansas Supreme Court does not accord with these principles, this Court should reverse the judgment of that Court and uphold the constitutionality of Arkansas Amendment No. 73.

CONCLUSION

Amendment 73 comports with the Constitution for the reasons expressed in this brief and the briefs filed by the petitioners and other parties in these cases. The judgment of the Arkansas Supreme Court should be reversed.

Respectfully submitted,

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